IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1702

JAMES M. ROCHFORD, et al.,

Petitioners,

vs.

ALLIANCE TO END REPRESSION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioners, James M. Rochford, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on March 1, 1977.

OPINIONS BELOW

The memorandum opinion and order of the district court entering a preliminary injunction against defendants-peti-

tioners, entered November 10, 1976, is unreported but is reproduced below in Appendix A.

The unpublished order of the Court of Appeals, entered March 1, 1977, affirming the order of the district court is reproduced in Appendix B.

JURISDICTION

The unpublished order of the Court of Appeals was entered on March 1, 1977.

The jurisdiction of this Court herein rests on U.S. Code Title 28, §1254(1).

QUESTION PRESENTED

May a district court enter a preliminary injunction prohibiting police surveillance of respondents and their attorneys absent a showing that the enjoined activity violated either respondents' First or Sixth Amendment rights.

STATEMENT OF THE CASE

The Complaint

Respondents filed suit against James Rochford, Superintendent of Police of the City of Chicago, and numerous other public officials and police officers, alleging that the operations of the intelligence division of the Chicago Police Department had violated respondents' First Amendment rights of free speech. Respondents sought an injunction preventing the police department from gathering information about persons engaged in lawful political activities as well as damages for alleged invasions of constitutional rights.

The Preliminary Injunction

On May 11, 1971, respondent Alliance To End Repression organized a "task force" to investigate the operation of the intelligence division and possibly bring a lawsuit to "expose" the division and its operational methods. In July, 1971, the intelligence division began surveillance of the Alliance task force aided by confidential informers who were members of the organization. As part of this investigation, photographs were taken of the members of the task force and their attorneys. The surveillance of the respondents continued until July 17, 1975 when it was terminated.

On November 13, 1974, the complaint in this cause was filed. On September 2, 1975, the respondents filed a motion for a temporary restraining order before District Judge Joel Flaum to whom the case was then assigned. They alleged that the police department had engaged in surveillance of communications between them and their attorneys and asked that such activity be restrained. The court stated that since the alleged surveillance had ended there was no threat to the respondents' conduct of the lawsuit and the temporary restraining order was denied on October 3, 1975. On October 8, 1975, respondents, alleging the same facts, filed a motion for a preliminary injunction. No action was taken by the court on this motion.

The case was subsequently reassigned to District Judge Alfred Kirkland and on July 29, 1976, respondents renewed their motion for a preliminary injunction. The basis for this renewed motion was the past surveillance which had been alleged earlier before Judge Flaum. On November 10, 1976, Judge Kirkland entered a preliminary injunction ordering petitioners to refrain from any surveillance of the respondents or their attorneys, and to prohibit the use of any evidence obtained by any prior surveillance. (Appendix A.) From this injunction order petitioners appealed to the United States Court of Appeals for the Seventh Circuit.

The Opinion Of The Court Of Appeals

The judgment of the Court of Appeals for the Seventh Circuit (Appendix B) affirmed the issuance of the preliminary injunction. The court of appeals concluded that although the district court, and all parties to the appeal, relied on constitutional arguments, especially first amendment claims, it was unnecessary to reach any constitutional issues. Instead the court stated that the preliminary injunction was merely a "tool" to limit the scope of discovery under Rule 26, Federal Rules of Civil Procedure. In addition, the court concluded that the injunction was supportable under the broad powers granted to district courts under the All Writs Act, 28 United States Code, section 1651. Because of the disposition of the case on grounds other than the constitutional, the court noted that it was unnecessary to reach the question of what effect this Court's decision in *Weatherford* v. *Bursey*, ... U.S. ....., 45 U.S.L.W. 4154 (February 22, 1977), might have on the case.

REASONS FOR GRANTING WRIT

THE HOLDING THAT A DISTRICT COURT MAY ENJOIN POLICE SURVEILLANCE ABSENT A SHOWING OF CONSTITUTIONAL VIOLATION IS CONTRARY TO PRINCIPLES LAID DOWN BY THIS COURT.

A DISTRICT COURT HAS NO JURISDICTION TO ENTER A PRELIMINARY INJUNCTION TO ENFORCE DISCOVERY.

The respondents sought preliminary injunctive relief in the district court based on allegations that past police surveillance of respondents and their attorneys violated the First Amendment right of free speech and the Sixth Amendment right to counsel. No allegations were made that the surveillance complained of was accomplished by the use of illegal wiretaps or that information was gathered by the use of illegal entry by police officers. Respondents' motion was based solely on constitutional issues and was not supported in any manner by reference to the discovery rules of the Federal Rules of Civil Procedure or by reference to the All Writs Statute, Title 28 United States Code, section 1651.

In issuing the preliminary injunction, the district court, pursuant to Rule 65, Federal Rules of Civil Procedure, made three findings: (1) that respondents were likely to prevail on the merits of their complaint; (2) that respondents have been irreparably harmed by petitioners' activity; and (3) that there will be no harm to the petitioners since the regular pre-trial discovery methods would be available to obtain information. This third finding by the district court was its only reference to discovery and it is clear that the preliminary injunction was not seen by the district court as being a discovery order.

In affirming the district court, the Court of Appeals ignored the constitutional issues raised by both petitioners and respondents, and ignored the petitioners' argument that respondents had failed to sustain their burden to prove entitlement to a preliminary injunction. Instead, the Court of Appeals went into a discussion as to the scope of discovery under Rule 26 and the work-product exclusion enunciated by this Court in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). It is important to note that work-product was never an issue before the district court and respondents' brief before the Court of Appeals stated that the only issue before the court was the question of whether petitioners' actions violated respondents' First Amendment Rights. (Appellees' Brief, page 16.) The Sixth Amendment argument was waived.

The opinion of the Court of Appeals which states that a preliminary injunction may be issued as a device to control discovery completely ignores the standards enunciated by this Court for the issuance of a preliminary injunction. In *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310 (1940) this Court stated that unless a specific finding of irreparable harm can be shown by the moving party, a preliminary injunction cannot issue. In *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975), this Court restated that the traditional standard for the issuance of a preliminary injunction requires the moving party to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits of his action.

The opinion of the Court of Appeals ignores these traditional standards for injunctive relief and provides instead that preliminary injunctive relief can be supported by either a showing or by an allegation that a party is engaged in overbroad discovery. Such a change in traditional standards is unjustified here since the Federal Rules of Civil Procedure contain adequate methods for control of discovery and since the respondents here could show neither irreparable harm nor a probability of success on the merits of their complaint.

Rule 37 of the Federal Rules of Civil Procedure provide for sanctions to be issued by the District Court for violation of discovery rules or orders. These sanctions striking of pleadings or claims or defenses, costs and fees, and contempt. No authority is given for the issuance of injunctive relief as a discovery sanction. Without such authority a district court can have no jurisdiction to issue such an injunction.

The Court of Appeals did not discuss whether respondents had shown a probability of success on the merits of their complaint. However, petitioners argued that the law was clear that police data collection and surveillance do not by themselves create any constitutional violation. The courts of appeals for five circuits, including the Seventh Circuit, have held that police intelligence activities are well founded in the police power and violate no constitutional provisions. *Aronson* v. *Giariosso*, 436 F.2d 955 (5th cir., 1971); *Fifth Avenue Peace Parade Committee* v. *Gray*, 480 F.2d 326 (2nd cir., 1973); *Donohoe* v. *Duling*, 465 F.2d 196 (4th cir., 1972); *Philadelphia City Meet. Rel. Soc. of Friends* v. *Tate*, 519 F.2d 1335 (3rd cir., 1975); *American Civil Liberties Union* v. *Laird*, 463 F.2d 499 (7th cir., 1972). These cases were all decided on the basis of this Court's opinion in *Laird* v. *Tatum*, 408 U.S. 1 (1972), where a challenge to the Army intelligence system was rejected.

Respondents' allegation regarding the use of informers to gather information similarly cannot support a probability of success on the merits of their complaint. In *Hoffa*

v. *United States,* 385 U.S. 293 (1966) and *Weatherford* v. *Bursey,* ..... U.S. ....., 45 U.S.L.W. 4154 (February 22, 1977), this Court stated that the use of confidential informers to gather information from criminal defendants or persons involved in litigation does not create a *per se* violation of the Fourth Amendment. Thus respondents' position in the court of appeals that the preliminary injunction was justified to protect litigants from police informers is not supported by the law.

It is for this reason that the court of appeals similarly threw aside legal issues and attempted to support the district courts' action as a matter of discovery. This result-orientated opinion, however, should not be allowed to stand as a precedent in this circuit.* This is especially true where the injunction entered has the effect of preventing valid police surveillance of respondents. As Mr. Justice Marshall noted in *Socialist Workers Party* v. *Attorney General,* 419 U.S 1314 (1974):

> "It is true that governmental surveillance and infiltration cannot in any context be taken lightly. The dangers inherent in undercover investigation are even more pronounced when the investigative activity threatens to dampen the exercise of First Amendment rights. See *DeGregory* v. *New Hamp. Atty. Gen.,* 383 U.S. 825, 16 L.Ed.2d 292, 86 S.Ct. 1148 (1966); *Gibson* v. *Florida Legislative Comm.,* 372 U.S. 539, 9 L.Ed.2d 929, 83 S.Ct. 889 (1963); *NAACP* v. *Alabama,* 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958). But our abhorrence for abuses of governmental investigative authority cannot be permitted to lead to an indiscriminate willingness to enjoin undercover investigation of any nature, whenever a countervailing First Amendment claim is raised."

* While the court of appeals has attempted to limit this opinion by the use of local Rule 35 which prevents citation of this opinion, at the very least the opinion is precedent in the continuing litigation remaining in this case. Petitioners do not now challenge the court of appeals' practice of preventing citation of its opinion. However, since all actions of the court of appeals have value as precedent, the constitutionality of Rule 35 is doubtful, and its continued use suspect.

The activity enjoined by the district court ended in 1975. Because of this respondents could not prove irreparable harm to support the injunction. Combined with respondents' poor legal position on the merits the court of appeals was forced to review the entry of the injunction as a discovery order so as to prevent a reversal of the district court. However in so doing, the court of appeals disregarded the traditional requirements needed to support injunctive relief. This Court's review is required so as to prevent petitioners from continuing restraint under an injunction improperly entered and erroneously reviewed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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May 31, 1977

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALLIANCE TO END REPRESSION, et al.,
Plaintiffs,

vs.

JAMES ROCHFORD, et al.,
Defendants.

No. 74 C 3268

MEMORANDUM OPINION AND ORDER

This matter is before the Court on plaintiffs' motion for a preliminary injunction restraining defendants from engaging in the following alleged activities: (1) joining plaintiffs' legal team; (2) gathering information about plaintiffs' evidence, legal strategy, legal preparations, legal objectives and litigation schedule; and (3) utilizing any of the above information in the litigation of this suit. Plaintiffs further seek an order compelling defendants to impound any information already gathered by defendants while engaged in the above-named activities.

The parties agree that since the written memoranda and exhibits submitted with regard to this motion constitute the evidence and there is no serious dispute as to critical facts, the motion for injunctive relief may be decided by this Court without an evidentiary hearing, *Ross-Whitney Corp.* v. *Smith, Kline, and French Labs,* 207 F.2d 190 (9th Cir. 1953).

(Memorandum Opinion and Order)

INJUNCTION AGAINST INFILTRATION AND INFORMATION-GATHERING

Plaintiffs argue that defendants must be restrained from infiltrating plaintiffs' legal team to obtain information and establish files about plaintiffs' legal preparations and evidence. In support of this argument plaintiffs present documentary evidence that defendants have engaged in the following activities: (1) infiltrated the Surveillance Task Force meetings of plaintiff Alliance to End Repression ("Alliance"); (22 photographed members of the Surveillance Task Force; (3) ordered background reports about members of the Surveillance Task Force and the attorney for plaintiff Alliance; (4) infiltrated plaintiffs' legal team and actively participated in interviewing potential plaintiffs; (5) attended private meetings of plaintiffs and their counsel; (6) attended a law school class in which pending litigation was discussed.

Defendants respond that they are no longer engaged in the infiltration activities described above and submit the affidavit of the Commander of the Intelligence Division which verifies that there has been no such activity during the past year, and there is no "present intention" to initiate such activity. Defendants further note that plaintiffs' most current documentary evidence of infiltration is dated July, 1975.

In order to grant a preliminary injunction this Court must find that movants have shown: (1) the likelihood of success on the merits; (2) irreparable harm to movants; (3) minimal harm to the non-moving parties and to the public,

(Memorandum Opinion and Order)

Rule 65, Federal Rules of Civil Procedure; *Illinois Migrant Council* v. *Pilliod*, No. 75-2019 (August 17, 1976).

Upon careful examination of the parties' arguments and evidence in this case, this Court concludes that it is necessary to enter a preliminary injunction against defendants' infiltration of plaintiffs' legal team. The Court finds plaintiffs have demonstrated that:

(1) Plaintiffs are likely to prevail on the merits.

(2) Plaintiffs have been irreparably harmed by defendants' infiltration. While there is no evidence that infiltration is *currently* going on, plaintiffs have shown that defendants' activities are likely to recur if an injunction is not granted. Defendants' representations that they are no longer engaged in the infiltration activities described are not enough, *Gray* v. *Sanders*, 372 U.S. 368, 376 (1963).

(3) There is no harm to defendants or the public generally since this Order only bars infiltration activities of defendants and not other methods of pretrial discovery.

Accordingly, this Court hereby orders that defendants and their agents are enjoined from joining plaintiffs' legal team.

INJUNCTION AGAINST USE OF INFORMATION PREVIOUSLY GATHERED

Plaintiffs next argue that defendants should be enjoined from *using* any information that has been gathered already and that any information should be impounded to insure that it will not be used in defendants' preparation for trial.

Defendants respond by making two arguments: (1) that plaintiffs' interests are not protectible interests, and (2) that plaintiffs have no right to the extraordinary remedy of a preliminary injunction because they have an adequate legal remedy to protect any interests they might have. Defendants argue that since Judge Perry has already ordered that established files are not to be destroyed, this Court has insured the availability of the evidence to plaintiffs.

Defendants further argue that plaintiffs' interest in defendants' use of files may later be protected by motions *in limine* or for a protective order. Defendants argue that under these circumstances plaintiffs have an adequate remedy at law and that no injunction should issue.

This Court does not agree that plaintiffs have an adequate remedy at law to protect them from the effects of defendants' surveillance activities. This Court finds plaintiffs have sufficiently demonstrated that defendants have gathered information about litigation plans and strategy by infiltration of meetings between organization members and at least one of plaintiffs' attorneys.

This Court strongly disapproves of the method by which defendants "discovered" information in preparation for trial in defiance of the Federal Rules of Civil Procedure. Infiltration allowed defendants to obtain "discovery" from plaintiffs in circumvention of orderly discovery procedures required by the Federal Rules. Further, defendants' surveillance allowed them to discover materials which would not have been discoverable under the Federal Rules, e.g. privileged materials.

This Court finds that plaintiffs have demonstrated: (1) a likelihood of prevailing on the merits; (2) irreparable harm because defendants' circumvention of the Federal Rules of Civil Procedure has prevented plaintiffs from exercising their rights to challenge such discovery; and (3) minimal harm to defendants in light of the fact that this does not bar lawful discovery contemplated by the Federal Rules.

CONCLUSION

Accordingly, the Court hereby enjoins defendants from joining plaintiffs' legal team. Defendants are enjoined from using any and all data which has been obtained by defendants or their agents as a result of joining plaintiffs' legal team and gathering information about plaintiffs' evidence, legal strategy, legal preparation, legal objectives, and litigation schedule by means other than orderly discovery procedures. Defendants are further enjoined from gathering information about non-public communications concerning plaintiffs' evidence, legal strategy, legal objectives or litigation schedules. This Court will impose stronger sanctions if defendants continue, as hereinbefore discussed, to gather information about plaintiffs' legal preparation.

Enter: /s/ Alfred Y. Kirkland,
Judge

Dated: November 10, 1976

APPENDIX B

Unpublished Order
Not To Be Cited
Per Circuit Rule 35

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued February 11, 1977
March 1, 1977.

Before
Hon. Thomas E. Fairchild, *Chief Judge*
Hon. Robert A. Sprecher, *Circuit Judge*
Hon. William J. Bauer, *Circuit Judge*

Alliance To End Repression, et al.,

Plaintiffs-Appellees,

No. 76-2293 vs.

James M. Rochford, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 74 C 3268.
Alfred Y. Kirkland, *Judge.*

ORDER

The sole issue on this appeal is whether the district court properly granted a preliminary injunction.

I.

On or about May 11, 1971, plaintiff Alliance to End Repression ["Alliance"] formed a Task Force to study the operations of the intelligence division of the Chicago Police Department with a view toward possible litigation

challenging the legality of some of the division's practices. And, in November 1974, the instant class action was filed claiming that certain activities of the intelligence division violated the constitutional rights of the named plaintiffs and members of the class.

Within two months of its formation, the Alliance Task Force itself became the subject of a special investigation by the intelligence division. Generally, the purpose of the investigation was to gather information about the Task Force and its proposed lawsuit. In furtherance of that objective, the defendants engaged in various activities which form the evidentiary basis for the issuance of the preliminary injunction which is the subject of this appeal.

The district court found that the documentary evidence establishes, *inter alia*, that the defendants engaged in the following surveillance and infiltration activities. They photographed members of the Task Force, and ordered background reports on both members of the Task Force and the attorney for the Alliance. Moreover, undercover police officers were assigned to and in fact did infiltrate the Alliance Task Force. Finally, and most significantly for purposes of the issue presented on this appeal, the defendants, through their undercover agents, actively participated in interviewing potential plaintiffs for this lawsuit, attended private meetings between plaintiffs and their counsel, infiltrated plaintiffs' legal team for purposes of obtaining information about plaintiffs' legal preparations, strategy and evidence, and in fact gathered information about plaintiffs' litigation plans and strategy by means of such infiltration.

Based upon plaintiffs' documentary evidence, on November 10, 1976, the district court entered the following order:

> . . . [T]he Court hereby enjoins defendants from joining plaintiffs' legal team. Defendants are enjoined

> from using any and all data which has been obtained by defendants or their agents as a result of joining plaintiffs' legal team and gathering information about plaintiffs' evidence, legal strategy, legal preparation, legal objectives, and litigation schedule by means other than orderly discovery procedures. Defendants are further enjoined from gathering information about non-public communications concerning plaintiffs' evidence, legal strategy, legal objectives or litigation schedules. This Court will impose stronger sanctions if defendants continue, as hereinbefore discussed, to gather information about plaintiffs' legal preparation.

It is from this order that defendants appeal, and our jurisdiction is derived from 28 U.S.C. § 1292(a)(1).

II.

Before addressing ourselves to the propriety of its issuance, we note that the challenged order is extremely narrow in its scope. It does not direct the defendants to completely refrain, pending a final hearing on the merits, from engaging in the intelligence-gathering practices challenged in the underlying lawsuit. The order simply enjoins defendants and their agents from engaging in certain covert information-gathering practices (and from using any information previously obtained through such practices) to the extent that those practices are directed at plaintiffs' efforts to litigate the merits of the underlying suit unhindered by the unorthodox "discovery" methods of an adversary party.

The scope of review upon appeal from the grant or denial of a preliminary injunction is narrowly confined. As this court stated in *Progress Development Corp.* v. *Mitchell*, 286 F.2d 222, 229 (7th Cir. 1961):

> . . . [I]t is well established that the issuance of a temporary injunction rests in the sound discretion of

> the trial court. On appeal, an order granting or denying such an injunction will not be disturbed unless there is a clear showing of an abuse of the discretion so exercised.

Accord, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *United States Steel Corp.* v. *Fraternal Association of Steelhaulers*, 431 F.2d 1046, 1048 (3d Cir. 1970).

In an attempt to establish that the district court exceeded its permissible discretion in the instant case, the defendants first contend that the preliminary injunction was based on the erroneous premise that defendants' covert operations could be found violative of the First Amendment. However, it is well settled that federal courts should avoid deciding constitutional issues where other grounds for decision are available. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Such avoidance is particularly appropriate where constitutional issues are presented at the preliminary injunction stage:

> "Ordinarily an appellate court, upon an appeal from an order granting or denying a temporary injunction, will not go into the merits of the case further than is necessary to determine whether the trial court exceeded a reasonable discretion in making the order, and this is especially true where the rights of the parties can only or can better be determined upon full proof of the facts."

Benson Hotel Corp. v. *Woods*, 168 F.2d 694, 697 (8th Cir. 1948) (citation omitted).

With these principles in mind, we are persuaded that, even if we assume that defendants' infiltration of plaintiffs' legal team does not contravene the First Amendment, the district court's exercise of discretion in issuing the preliminary injunction, under the circumstances of this

case, is clearly supportable on other non-constitutional grounds.[1]

The Federal Rules of Civil Procedure afford litigants a broad range of methods for obtaining material relevant to the litigation. Rule 26(a) provides:

> Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

The scope of discovery under the Federal Rules is also extremely broad. Rule 26(b)(1) provides in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

[1] In light of the basis for our disposition of this appeal, it is unnecessary to reach the question of what effect, if any, the Supreme Court's recent decision in *Weatherford* v. *Bursey*, 45 U.S. L.W. 4154 (U.S. Feb. 22, 1977), might have on the question of the constitutionality of the defendant's infiltration of plaintiff's legal team. In *Weatherford* the Court held only that the mere presence, without more, of a government informant at a meeting between a defendant in a criminal case and his counsel did not constitute a *per se* violation of the Sixth Amendment. Although the Court indicated that the federal courts had no "general" supervisory power over state police investigations, there can be no doubt that a federal district court does have the power to supervise the federal discovery process in litigation pending before it. Moreover, the Court specifically noted that the case before it involved neither communication of defendant's trial strategy or preparations by the informant to the government nor a purposeful intrusion by the government into the defendant's trial preparations.

However, a litigant's entitlement to disclosure of material through the aforementioned discovery tools is not without limits. For example, Rule 26(b)(3) provides in pertinent part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Thus, there is a qualified immunity from discovery of material "prepared in anticipation of litigation . . . by or for another party or by or for that other party's representative" and an absolute immunity from discovery of "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." The rationale underlying these limits on the scope of discovery was cogently articulated by the Supreme Court in *Hickman* v. *Taylor*, 329 U.S. 495, 510-12 (1947):

> In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case

> demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within . . . our system of jurisprudence . . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly . . . termed . . . as the "work product of the lawyer." . . . [T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production . . . .

Where parties to litigation adhere to the discovery methods prescribed by the federal rules, adequate safeguards are available to prevent undue interference with the course of a party's legal preparations. For, although the Federal Rules contemplate that normally discovery will be handled on a voluntary basis, the efficacy of the federal discovery process ultimately depends upon its supervision by the district courts. Thus, if material is sought which one party considers immunized from discovery and which the other party deems properly discoverable, a pre-disclosure determination as to discoverability can be obtained from the district court. The party seeking discovery can move the court under Rule 37(a) for an order compelling discovery; the party seeking to prevent disclosure may, of course, raise the issue of discoverability in response to the motion to compel.

Moreover, the party from whom discovery is sought may in appropriate circumstances move the district court under

Rule 26(c) for a protective order. Rule 26(c) provides in pertinent part:

> Upon motion by a party . . . from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that the discovery not be had . . . [or] that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.

As Professor Wright has noted:

> Rule 26(c) authorizes the court to make orders for the protection of parties or persons from whom discovery is being sought. This provision gives the court broad power to control the use of the discovery process and to prevent its abuse, with the sound discretion of the court substituted for any arbitrary limit on discovery.

C. Wright, *Law of Federal Courts* 412 (3d ed. 1976).

However, where parties, such as defendants in the instant case, deviate from the liberal discovery methods prescribed by the Federal Rules and seek to "discover" material by covert infiltration of their opponent's legal team, the efficacy of the discovery process is seriously undermined. The party from whom discovery is sought is precluded from obtaining that *pre-disclosure* protection which, as noted above, is contemplated by the Federal Rules. It cannot seriously be contended that adequate judicial safeguards exist *after* materials prepared in anticipation of litigation or legal plans and strategy have been "discovered" by an adversary party. There can be no doubt that the court below, in issuing the challenged order, was keenly aware of the threat to orderly judicial process posed by the "discovery" techniques employed by the defendants in this case. The court stated:

> This Court strongly disapproves of the method by which defendants "discovered" information in prepararation for trial in defiance of the Federal Rules of Civil Procedure. Infiltration allowed defendants to obtain "discovery" from plaintiffs in circumvention of orderly discovery procedures required by the Federal Rules. Further, defendants' surveillance allowed them to discover materials which would not have been discoverable under the Federal Rules . . . .[2]

Accordingly, we find that the district court was well within the bounds of its permissible discretion in issuing an order designed to preserve the integrity and efficacy of the discovery process in litigation pending before it. The All Writs Act, 28 U.S.C. § 1651, provides in pertinent part that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." As the Supreme Court stated in *Adams* v. *McCann*, 317 U.S. 269, 272-73 (1942), "[u]ninterruptedly from the first Judiciary Act . . . to the present day . . . , the courts of the United States have had powers of an auxiliary nature 'to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions . . . .'" And it has long been undersood that the "writs" contemplated by the Act includes

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[2] Defendants contend that the materials "discovered" were not technically privileged under the rules of evidence regarding attorney-client privilege. Even if we assume this is true, we deem it irrelevant. While it is true that technically privileged materials are outside the scope of discovery, it is also true that an attorney's work product is given a qualified immunity from discovery and his "mental impressions, conclusions, opinions, or legal theories" are afforded absolute immunity from discovery. The real problem with defendants' "discovery" techniques in this case is that they precluded the plaintiffs from obtaining a *pre-disclosure* determination of whether the materials sought were subject to discovery under the Federal Rules.

injunctive relief, such as that afforded by the court below. *See, e.g., United States* v. *Western Pennsylvania Sand & Gravel Ass'n.*, 114 F. Supp. 158 (W.D. Pa. 1953).

The defendants next contend that the district court's order should be set aside because the defendants' surveillance and infiltration operations no longer pose any threat to plaintiffs' litigation efforts. In support of this contention, defendants direct our attention to an August 18, 1976 affidavit by Walter Murphy, the Commander of the Intelligence Division, which states in pertinent part:

> There has been no such surveillance within the past year. The Intelligence Division has no *present plans* to initiate any surveillance of the . . . attorneys and/or plaintiffs with respect to their participation in the . . . litigation.

The district court, however, found defendants' assertion that they have no "present plans" to reinstitute their covert operations directed at plaintiffs' litigation efforts insufficient to overcome the likelihood of recurrence if an injunction were not granted.

In light of the longstanding nature of defendants' activities, we cannot say that a simple assertion that there exist no "present plans" to resume the challenged conduct is sufficient to render the district court's finding clearly erroneous. As the court noted in *Bailey* v. *Patterson*, 323 F.2d 201, 205 (5th Cir. 1963), *cert. denied*, 376 U.S. 910 (1964) (citations omitted):

> Appellees insist that these practices have now ceased . . . . Even assuming this to be so, appellants are entitled to injunctive relief. . . . [T]he threat of continued or resumed violations of appellant's federally protected rights remains actual. Denial of injunctive relief might leave the appellees "free to return to [their] old ways." . . . "It is the duty of the courts to beware of efforts to defeat injunctive relief by pro-

testations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption."

Accord, Lankford v. *Gelston*, 364 F.2d 197 (4th Cir. 1966); *United States* v. *W.T. Grant Co.*, 345 U.S. 629 (1953); *Consumers Union of United States, Inc.* v. *Admiral Corp.*, 186 F.Supp.800 (S.D.N.Y. 1960).[3]

Moreover, even if we were to assume that the actual injury to plaintiffs' litigation efforts as a result of defendants' infiltration of plaintiffs' legal team was not great (being mindful, of course, that such harm is difficult to quantify), the threatened injury to the plaintiffs still far exceeds the threatened harm the injunction may inflict on the defendant. *See Fox Valley Harvestore, Inc.* v. *A.O. Smith Harvestore Products, Inc.*, No. 76-1611 (7th Cir. Dec. 7, 1976) Slip Op. at 2. The district court's order only prevents defendants from employing "discovery" devices which circumvent the Federal Rules of Civil Procedure; the order in no way prevents defendants from obtaining information to which they are lawfully entitled, so long as they seek to obtain it in the manner contemplated by the Rules. It cannot seriously be argued that a party has suffered "injury" by being required to act in accordance

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[3] *See also Atlantic Richfield Co.* v. *Oil, Chemical & Atomic Workers International Union*, 447 F.2d 945, 947 (7th Cir. 1971) (citations omitted), where Judge (now Justice) Stevens stated:

> A voluntary cessation of wrongful conduct *may* eliminate the need for injunctive relief but does not defeat a court's power to act. . . . The exercise of that power depends on the court's appraisal of all relevant circumstances, including the threat or likelihood of recurring violations. . . . If past wrongs have been proved, and the possibility of future misconduct survives, so does the court's power.

As noted in the text above, we are persuaded that the district court's appraisal of the circumstances in this case evidences a reasonable exercise of its discretion.

with the rules governing litigation in the federal courts. As Judge Friendly noted in *Studebaker Corp.* v. *Gittlin*, 360 F.2d 692, 698 (2d Cir. 1966):

> [A]ll that "irreparable injury" means in this context is that unless an injunction is granted, the plaintiff will suffer harm which cannot be repaired.[4] At least that is enough where, as here, the only consequence of an injunction is that the defendant must effect a compliance with the statute which he ought to have done before.

Accordingly, for the reasons stated in this order, we find that the grant of a preliminary injunction by the district court did not constitute an abuse of discretion.

Affirmed.

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[4] The injury sought to be avoided here is an unwarranted intrusion upon plaintiffs' litigation efforts by the covert acquisition of materials relating to plaintiffs' legal preparations. The Federal Rules protect parties in this regard by giving them a right to a *pre-disclosure* determination by the courts on discoverability questions. Once disclosure has occurred, the injury can never be repaired.

IN THE

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Petitioners,

vs.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the District Court abused its discretion in issuing a preliminary injunction barring defendants from continuing their systematic surveillance of plaintiffs' legal preparations and infiltration of plaintiffs' legal team.

STATEMENT OF THE CASE

Plaintiff Alliance To End Repression ("Alliance"), a coalition of organizations and individuals, is engaged in political and social activity in Chicago. On or about May 11, 1971, the Alliance formed a Surveillance Task Force to study the Subversive Unit of the Chicago Police Department and to prepare possible litigation to challenge the constitutionality of some of that Unit's activities.

Within two months of its formation, the Surveillance Task Force itself became the subject of surveillance. On July 12, 1971, the Subversive Unit commenced a special investigation of the Alliance which it code-named "Watchdog". The purpose of Watchdog was intelligence-gathering and "neutralization". As part of Watchdog, two undercover police officers infiltrated the Surveillance Task Force.

Within eleven days after the commencement of Watchdog, defendants' agents had concluded that a lawsuit "is the type of action the SUBJECT (Alliance) wishes to seek in THEIR attempt to obtain legislative and/or judicial relief and accountability in regards to the activities of the Subversive Unit of the Intelligence Division". As it became clear that progress was being made in the preparation of the lawsuit against the Subversive Unit, the police infiltrators were ordered specifically "to obtain any and all information regarding the lawsuit against the Red Squad".

Approximately one year after the special investigation had begun, a third paid police informant infiltrated the Alliance, and she became a member of its Steering Committee. This paid informant's police control officers stated

that they would "obtain and report information regarding questions members of the Alliance Surveillance Task Force are asking various groups to be used in a later lawsuit against the Security Section". The informant subsequently volunteered to assist plaintiffs' attorney in the preparation of the lawsuit by interviewing potential plaintiffs concerning their evidence. After interviewing five potential plaintiffs, the informant turned over to defendants a copy of the text of the questions and answers, which contained detailed accounts of those persons' allegations and evidence. Defendants' reports state that defendants knew that the Alliance intended "to use this information in a federal suit to show that the Red Squad engages in activities that violate lawful and constitutional guarantees afforded to citizens engaged in group activity".

Apart from these specifics, on many occasions defendants' infiltrators gathered intelligence on evidence to be used in the lawsuit and on plaintiffs' legal strategy, legal preparations, and litigation schedule. The sources of defendants' intelligence included overheard private conversations, private notes of a meeting, a private letter, attendance at a variety of private meetings and other sources of information the nature of which are presently unknown to plaintiffs.

On November 13, 1974 the instant class action was filed by the Alliance, claiming that certain practices of the Subversive Unit violated the constitutional rights of the plaintiffs.

Defendants' agents continued their information gathering on plaintiffs' legal preparations for several months after the lawsuit was filed and ceased their activities only after plaintiffs discovered and exposed the three infiltrators as secret police agents.

The information gathered by the Subversive Unit has been used in a variety of attempts to subvert the Alliance lawsuit. In response to a report from one of their infiltrators that the Alliance was "ready to proceed with the lawsuit", defendants destroyed relevant documentary evidence. (See Memorandum Opinion and Order on sanctions, November 10, 1976, p. 3.) In addition, a private letter from plaintiffs' attorney to members of the Alliance was obtained by one of defendants' infiltrators who then communicated its content to the Subversive Unit. Information contained within that letter as to the attorney's established deadline for adding new plaintiffs to the planned suit was subsequently relied upon by defendants in support of their Motion to Strike the Complaint and in their opposition to plaintiffs' Motion for Class Certification.

Counsel for defendants have repeatedly asserted their intention to continue to use the fruits of their infiltration of plaintiff Alliance to subvert this lawsuit. On September 3, 1975, while referring to defendants' intelligence-gathering on plaintiffs' legal preparations, defendants' counsel stated:

> We are entitled to present a defense, and we intend to present a defense with whatever material we have available to us.

These and similar activities of the defendants have seriously hampered plaintiffs' ability to pursue this litigation in the type of atmosphere that is essential to the operation of the adversary system.

Defendants have never suggested any specific law enforcement purpose or any other legitimate governmental purpose for their conduct described here.

On November 10, 1976, the District Court granted plaintiffs' Motion for a Preliminary Injunction. The Court found that there was documentary evidence that defendants had infiltrated the Surveillance Task Force and ordered background reports on its members and on the Alliance attorney, infiltrated plaintiffs' legal team, actively participated in interviewing potential plaintiffs, and attended private meetings of plaintiffs and their counsel. The Court also specifically found that "defendants have gathered information about litigation plans and strategy by infiltration of meetings between organization members and at least one of plaintiffs' attorneys".

Accordingly, the District Court enjoined defendants from joining plaintiffs' legal team, from using in this litigation any data which they had obtained by previously having joined plaintiffs' legal team, and from gathering non-public information concerning plaintiffs' evidence, legal strategy, legal preparations, legal objectives and litigation schedule, other than through orderly discovery procedures.

On March 1, 1977, the Court of Appeals for the Seventh Circuit affirmed the issuance of the preliminary injunction.

REASONS FOR DENYING WRIT

The opinion of the United States Court of Appeals for the Seventh Circuit in this case is not in any way inconsistent with any decision of this Court nor of any court of appeals nor does it involve any important federal questions. Moreover, as the Court of Appeals recognized, the preliminary injunction in this case is of extremely narrow scope:

> Before addressing ourselves to the propriety of its issuance, we note that the challenged order is extremely narrow in its scope. It does not direct the defendants to completely refrain, pending a final hearing on the merits, from engaging in the intelligence-gathering practices challenged in the underlying lawsuit. The order simply enjoins defendants and their agents from engaging in certain covert information-gathering practices (and from using any information previously obtained through such practices) to the extent that those practices are directed at plaintiffs' efforts to litigate the merits of the underlying suit unhindered by the unorthodox "discovery" methods of an adversary party.

Finally, the reasoning of the Court of Appeals is unimpeachably correct. Finding it inappropriate and unnecessary to address plaintiffs' contention that the activities of the defendants in the context of this case are violative of the First and Fourteenth Amendments, the Court of Appeals reasoned that such activities seriously undermine the carefully designed discovery procedures of the Federal Rules of Civil Procedure. Accordingly, the Court concluded that "the district court was well within the bounds of its permissible discretion in issuing an order designed to preserve the integrity and efficacy of the discovery process in litigation pending before it". We adopt the opinion of the Court of Appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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